Petition

81-1826

No.

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WORDEN CUSTARD ET AL., PETITIONERS

v.

CITY OF SOUTH BEND

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

John R. Obenchain
1800 American National
Bank Building
South Bend, Indiana 46601
(219) 233-1194

Don G. Blackmond
126 S. Scott Street
South Bend, Indiana 46625
(219) 233-5147

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QUESTIONS PRESENTED

1. Whether the State Appellate Court's construction of the Indiana annexation statute violates the Fourteenth Amendment's guarantee of due process by failing to require the trial court to hold a hearing, with notice to all remonstrators, before determining whether a sufficient number of landowners within the territory proposed for annexation have property participated in the remonstrance petition.

2. Whether the petitioner, Fred N. Davis, as a remonstrator owning land within the territory proposed for annexation, was denied due process of law when a hearing was held by the St. Joseph Superior Court concerning the sufficiency of his remonstrance in the absence of:

(a) Any prior notice of said

hearing, and

(b) Any representation by counsel.

3. Whether the petitioners, other than Fred N. Davis, were denied due process in the proceeding before the St. Joseph Superior Court in that :

(a) Their counsel was given only three hours informal notice of the hearing on the adequacy of the remonstrance and was denied sufficient time to prepare for trial;

(b) The trial court permitted a new attorney to enter his appearance on behalf of all remonstrators, allowed the remonstrators previous attorney to withdraw and yet when the new attorney

later revealed to the
court that he only
represented remonstrators
who wished to withdraw
their remonstrance, the
court did not require
notice sent to all parties.

LIST OF PARTIES TO THE PROCEEDING

Worden Custard, Helen Custard, Virgil J. Albright, Kathleen Albright, Lawrence D. Schmidt, Bessie Schmidt, Richard D. Fox, Vicky Ann Fox, Eugene E. Zimmer, Jane Zimmer, George V. Thorpe, Mildred Thorpe, Charles T. Hodgson, Betty R. Hodgson, Stephen Farkas, Betty Farkas, Francis O. Smith, Fern E. Smith, Francis O. Smith, Jr., Karl V. Markuseen, Olga Markussen, Mary Black, Zulma Delaere, Richard Pritzel, Viola Pritzel, Adam C. Lukasiak, Laura Lukasiak, Fred N. Davis, Helen E. Davis, Eugene Guentert, Sr., Bernice Guentert, Russell O. Jacoby, Louise Jacoby, Joseph P. LaPara, Rose LaPara, Robert Molderink, Marjorie Molderink, John Hoffman, Jacqueline Hoffman, George H. Bonavia, William E. Johnson, Regina

Johnson, Joseph M. Zappia, Concetta T. Zappia, Glendon R. Lutes, Phyllis Lutes, Joseph M. Zappia, Tina Zappia, Bernard S. Kielton, Barbara Kielton, Joseph Varga, Mary Varga, Wyman C. Ferman, Beatrice Ferman, Arthur A. James and Betty James.

Fred N. Davis, Margaret Bostic, Earl E. Bostic, Kathy Valheim, Thomas A. Young, Carol Anastasio, Casmier Bumbaca, Maria Bumbaca, Richard G. Pritzel, Viola L. Pritzel, Zulma Delaere, Francis O. Smith, Jr., Fern E. Smith, Edward A. Thorpe and Adam Lukasiak are the only parties appealing the decision of St. Joseph Superior Court and petitioning this Court for writ of certiorari.

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The petitioners, Fred N. Davis, Margaret Bostic, Earl E. Bostic, Kathy Valheim, Thomas A. Young, Carol Anastasio, Casmier Bumbaca, Maria Bumbaca, Richard G. Pritzel, Viola L. Pritzel, Zulma Delaere, Francis O. Smith, Jr., Fern E. Smith, Edward A. Thorpe, Adam Lukasiak pray that a writ of certiorari issue to review the opinion and judgment of the

the Indiana Court of Appeals rendered in these proceedings on July 27, 1981, transfer to the Indiana Supreme Court having been denied on December 31, 1981.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals, as yet unreported appears at Appendix A, infra, p.p. 1a to 18a. The Indiana Supreme Court denied transfer by minute entry without opinion, as appears at Appendix B, infra, page 19a. The decision of the St. Joseph Superior Court appears at Appendix C, infra, p.p. 20a , 21a.

JURISDICTION

The order or judgment of the Indiana Supreme Court denying transfer was entered on December 31,1981. See Appendix B, infra, page 19a. This

petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV § 1:

> "... nor shall any state deprive any person of life, liberty, or property without due process of law..."

Indiana Code of 1971, I.C. 18-5-10-24:

> "Remonstrance against annexation -- Procedure for filing.-- Whenever territory is annexed to a city, whether by general ordinance defining the city boundaries or by special ordinance for the purpose of annexing territory, an appeal may be taken from the annexation by either a majority of the owners of land in the territory or by

the owners of more than seventy-five percent (75%) in assessed valuation of the real estate in the territory, if they deem themselves aggrieved or injuriously affected, by filing their remonstrances in writing against the annexation, together with a copy of the ordinance, in the circuit or superior courts of the county where the territory is situated or with the judge thereof in vacation within sixty (60) days after the last publication provided for in section 402 (18-5-10-20) of this article. The written remonstrance or complaint shall state the reason why annexation should not in justice take place.

" Upon receipt of the remonstrance the court or the judge thereof in vacation shall determine whether it bears the necessary signatures and complies with the requirements of sections 406 through 408 (18-5-10-24 -- 18-5-10-16) of this article.

In determining the total number of landowners of the area and whether or not signers of the remonstrance are landowners, the names as they appear upon the tax duplicate shall be prima

facie evidence of ownership. In ascertaining the number of landowners of the area and for the purpose of determining the sufficiency of the remonstrance as to the number of landowners required to constitute a majority, not more than one (1) person having an interest in a single property, as evidenced by the tax duplicate, shall be considered a landowner.

"Upon the determination of the judge of the court that the remonstrance is insufficient he shall fix a time for a hearing on the remonstrance which shall be held not later than sixty (60) days thereafter. Notice of the proceedings by way of summons shall be served upon the proper offices of the city seeking to make annexation, and the city shall become defendant in such cause, and shall be required to appear and answer as in other cases."

STATEMENT

On August 24, 1971, approximately twenty-nine (29) remonstrators filed their remonstrance and appeal from a general annexation ordinance enacted by the City of South Bend. The City of South Bend filed its answer to the remonstrance and complaint on date of January 28, 1971. The remonstrators were represented by attorney Joseph Roper of South Bend, Indiana, until December 16, 1979, when he withdrew, attorney Daniel Manion of South Bend, Indiana, having on December 15, 1979, appeared for all the remonstrators. Attorney Manion's representation of the remonstrators continued until April 25, 1980, when he withdrew his appearance upon the representation by Sanford Brook, a South Bend attorney, that he, Brook, now represented interests

of all of the remonstrators.

This cause of action was then assigned on date of April 29, 1980, to the Honorable William A. Hosinki, Judge of the St. Joseph Superior Court.

On April 29, 1980, attorney Sanford Brook filed a request of certain remonstrators to withdraw as remonstrators in this action. On the same date, April 29, 1980, attorney James Groves entered his appearance for certain of the remonstrators. At the hearing commenced on April 29, 1980, this colloquy took place between the trial judge and the various counsel:

> "The Court: E-9772, Worden Custard, et al. versus the City of South Bend. The Plaintiffs appear by Attorney James Groves and the City of South Bend is represented by City Attorney Robert Parker --
>
> MR. BROOK: Your Honor, I had appeared for plaintiffs

also, I had appeared for a group of plaintiffs for all of them and Mr. Groves this morning appeared for specific plaintiffs.
THE COURT: I assumed since you were sitting at counsel's table --
MR. BROOK: We didn't know which table we were going to share.
THE COURT: Change that record to show that the City appears by City Attorney Richard Hill and Deputy City Attorney Robert Parker and that the plaintiffs appear by Attorney James F. Groves and Sanford Brook.
MR. BROOK: Your Honor:
MR. GROVES: Excuse me one second. Not to butt in, but your Honor, I have filed an entry of appearance this morning.
THE COURT: It's noted on the docket sheet.
MR. GROVES: I have an additional filing that perhaps ought to be noted, because I'm appearing for additional parties plaintiff and I recognize this feels like a photocopy, but those are original signatures on that.
THE COURT: Then what you have is two entries of appearance on behalf of certain parties, each filed on the 29th day of April, 1980 ?
MR. GROVES: Yes, that's correct.

> THE COURT: Now, let there show this date -- comes now James F. Groves and files entry of appearance for additional parties plaintiff. Are we to assume then, gentlemen, all parties plaintiff other than those set forth on Mr. Groves' entry of appearance form are represented by you, Mr. Brook ?
> MR. BROOK: No, that's not necessarily correct, Your Honor. I have -- there are twenty nine party plaintiffs in terms of groupings. I have fifteen that I represent that are included in this filing, and I'm going to make-- and Mr. Groves represents his twelve. That would leave three more unaccounted for."

The hearing on the sufficiency of the remonstrance was concluded on date of April 30, 1980, when the parties were given the opportunity to file briefs on the questions within one (1) week from date.

On May 7, 1980, the remonstrator, Fred N. Davis, by his attorney filed a written objection to the hearing held on April 29 and 30, 1980, and petitioned for

hearing and for stay of all proceedings alleging in pertinent part that he, the remonstrator, Fred N. Davis, had received no notice that attorney Daniel Manion was no longer his attorney, that he had not authorized attorney Sanford Brook to have entered an appearance for him nor had he authorized attorney James Groves to have entered an appearance for him and that he, Fred N. Davis, was in fact without legal counsel on April 29 and 30, 1980, and was not notified of the hearing held on those dates until after the fact. On date of May 5, 1980, attorney Sanford Brook filed a factual memorandum of certain remonstrators in regarding the conferral of jurisdiction by pleadings. Attorney Brook sought by the factual memorandum above referred to, to remind the court that:

> "The counsel for the fifteen (15) Remonstrators seeking withdrawal indicated at the trial court that he only has authority to speak for those individuals requesting withdrawal. The proceedings thus far, although litigated in an adversarial context, were not such as would pit one group of Remonstrators against another."

On date of May 9, 1980, the trial court overruled the objection of Fred N. Davis as to the proceedings held on dates of April 29 and 30, 1980, and further overruled remonstrator, Fred N. Davis' motion for hearing and stay of the proceedings. By the same minute entry, the trial court found the signatures of the requisite number of remonstrators to be lacking both in number and assessed valuation, and entered judgment of dismissal as to the remonstrance and appeal.

During the course of the hearing

proceeding held on the afternoon of April 29, 1980, attorney James Groves objected to proceeding at that time due to the fact that he had only three (3) hours notice of the proceedings. Attorney Sanford Brook having first represented to the court that he had entered an appearance for all of the remonstrators tried to limit his appearance at that time to only fifteen (15) of the remonstrators. Attorney Brook sought an immediate ruling on the petition of certain remonstrators to withdraw their signatures. At approximately 3:00 p.m., on the date of April 29, 1980, the trial court announced that it was prepared to go forward with a hearing on the sufficiency of the remonstrance. Attorney Groves again at the close of the evidence on the first day requested a continuance

so as to be prepared and again at the commencement of the proceedings on date of April 30, 1980, filed with the court a written motion for continuance, both were denied.

From the judgment of dismissal entered May 9, 1980, the remonstrators filed their motion to correct errors on July 3, 1980, which said motion to correct errors was heard on July 14, 1980, and was duly overruled on date of July 31, 1980.

The motion to correct errors asserted the lack of notice of the April 29, 1980 hearing and absence of representation of counsel with regard to petitioner, Fred N. Davis, further, the motion asserted the denial of due process to the other petitioners regarding the deceptive representations of attorney Brook, counsel for the withdrawing

remonstrators, and the denial of sufficient time for attorney Groves to prepare for the evidentiary hearing that occurred on April 29 and 30, 1980.

On appeal the above due process violations were presented to the Indiana Court of Appeals and on July 27, 1981, that court held that the Indiana annexation statute, I.C. 18-5-10-24 did not require any hearing to determine the sufficiency of the remonstrance.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with the due process principles enunciated in this Court's Schroeder ruling.

In Schroeder v. City of New York, 371 U.S. 208 (1962), this Court held that the due process requirements of the Fourteenth Amendment requiring that parties be notifed of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process - the right to be heard. The Schroeder Court, citing the case of Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950), went on to state that the right to be heard has little realty or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. 371 U.S. at 212.

In Schroeder the City of New York failed to give landowners proper notice that a river abutting their property would be diverted. The property was not to be taken by eminent domain, but rather some tangential incidences of ownership would be affected, such as the river's value for fishing and boating. This Court reversed the New York Court of Appeals, allowing the landowners to sue the City for damages even though the statute of limitations had expired.

In the case at bar, Fred N. Davis, as well as the other petitioners are landowners whose property will be directly affected by any annexation by the City of South Bend.

Municipal ordinances adopted by state authority constitute "state action" and are within the prohibition of the Fourteenth Amendment's Due Process

provision. Staub v. City of Boxley, 355 U.S. 313 (1958).

Proper notice of the lack of legal representation and of the April 29 and 30, 1980 hearing was essential for due process to occur.

As it is indicated in the STATEMENT attorney Daniel Manion represented all of the remonstrators up to the date of April 25, 1980. On that date attorney Sanford Brook entered an appearance for all of the remonstrators. Upon that representation by attorney Sanford Brook, attorney Daniel Manion withdrew his appearance as counsel for all of the remonstrators and turned over his file to attorney Sanford Brook. The record reflects the fact that no notice was given to the remonstrators of the change of counsel.

It is further clear from the record

that a scant four (4) days following the entry of attorney Sanford Brook's appearance for all of the remonstrators, he sought to limit his appearance to fifteen (15) of the wenty-nine (29) remonstrators. On that date, April 29, 1980, attorney Sanford Brook filed a motion on behalf of fifteen (15) remonstrators wherein they asked leave to withdraw their signatures as remonstrators. The record nowhere reflects that attorney Sanford Brook notifed the twenty-nine (29) remonstrators of his intent to terminate their remonstrance before he entered his appearance purportedly on their behalf.

The record further clearly indicates that attorney James Groves entered his appearance on behalf of some of the remonstrators. The record further clearly shows that at least three (3) of the

remonstrators (who had all been previously represented by attorney Daniel Manion) were, as of April 29, 1980, not represented by anyone.

The trial court judge was made well aware of this fact. Notwithstanding this knowledge, the trial court proceeded to hear the issue raised by the certain remonstrators petition to withdraw and further to determine the sufficiency of the remonstrance on dates of April 29 and 30, 1980. No notice of any kind was sent to Fred N. Davis or for that matter any of the remonstrators of the fact that a hearing was to be conducted on that date by the trial court as to the sufficiency of the remonstrance. Attorney James Groves protested that with a scant three (3) hours notice of attorney Sanford Brook's position that he, attorney Groves could not possibly be prepared to try the

legal issues involved.

With this background and after remonstrator, Fred N. Davis, had learned of these facts, Fred N. Davis hired his own counsel to represent his interests. Accordingly, Fred N. Davis caused an objection to be filed concerning the hearings held on dates of April 29 and 30, 1980, and further filed a petition pursuant to I.C. 34-1-60-7 [1], requesting the court to cause attorney Sanford Brook to produce written authority upon which he had entered his appearance purportedly for

---

1. I.C. 34-1-60-7 provides as follows: "The court or judge may, on motion of either party, and on showing reasonable ground therefor, or without such motion, require an attorney to produce and prove the authority under which he appears, and until he does so, may stall all proceedings by him on behalf of the party for whom he assumes to appear."

the entire group of the remonstrators, and further requesting the trial court to stay all proceedings commenced by said attorney Sanford Brook until a determination of his authority could be had.

It is clear from the record that there were parties to the proceeding who were not represented by either attorney James Groves or attorney Sanford Brook. Under these circumstances the remonstrator, Fred N. Davis, has assigned in his motion to correct errors the trial court's ruling overruling his objection and motion for stay as a denial of a fair trial by this irregularity in the proceedings of the court, and further that he was denied a fair trial by reason of the misconduct of the prevailing remonstrators in having very effectively deprived Fred N. Davis of his legal counsel.

The opinion of the Indiana Court of Appeals is an even greater assault on the Fourteenth Amendment rights of petitioners than that of the trial court. The lower appellate court has held that the evidentiary determination as to the sufficiency of the remonstrance may occur without any hearing whatsoever, without any notice to the remonstrators bound by such a final determination. Such a conclusion directly conflicts with this Court's holding in Schroeder, supra.

Furthermore, the petitioners who were represented by attorney Groves at the hearing of April 29 and 30, 1980, were denied a meaningful opportunity to be heard. This Court in Boddie v. Connecticut, 401 U.S. 377 (1971) restated the principle that due process, at a minimum, that absent a countervailing state interest of overriding significance,

persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. It was held that the Constitution required an "opportunity" granted at a meaningful time and in a meaningful manner. 401 U.S. at 378. The trial court, by proceeding with the evidentiary hearing while cognizant of only three (3) hours notice to attorney Groves and the total lack of legal representation for several remonstrators denied petitioners' right to a meaningful hearing.

Prior Indiana cases have established that in determining the sufficiency of the remonstrance petition, a hearing in conformance with due process be held. Daubenspeck v. City of Ligonier (1962) 135 Ind. App. 565, 183 N.E. 2d 95 ; Kolar v. City of LaPorte (1964) 136 Ind.

App. 199, 198 N.E. 2d 878; In Re Annexation of Territory to City of Muncie (1971) 150 Ind. App. 245, 276 N.E. 2d 198.

In Re Annexation of Territory to City of Muncie, supra, is a case that is very analogous to the case at bar. In the Muncie case supra a lawyer filed a petition for remonstrance by group of remonstrators. Subsequent to the filing of the remonstrators the attorney who had filed the proceedings filed a withdrawal of his appearance and a second attorney entered his appearance on behalf of the remonstrators. The court took no action allowing the withdrawal of the first attorney or approving or disapproving of such change of counsel. Prior to the time of the change of counsel the trial court, the Sue Shields, special judge, ordered the auditor of the county to

prepare and file a certified report as to the number of property owners and the assessed valuation and other information relating to the sufficiency of the remonstrance. The auditor filed the required report. On March 3, 1971, the second attorney filed his motion to withdraw appearance on behalf of the remonstrators. His motion to withdraw was then set for hearing on March 17, 1971, and a hearing on the sufficiency of the remonstrance was set for March 26, 1971, and notice of the hearing on the motion and the hearing on the remonstrance were ordered published in the newspaper of general circulation.

On March 17, 1971, proof of publication was filed and the court held hearing on the motion of the second attorney to withdraw his appearance and the court allowed the second attorney to

withdraw his appearance for the remonstators. On March 26, 1971, the court found that proper notice of the hearing had been provided to all interested parties. In the Muncie case it is clear that notice of the hearing on the sufficiency of the remonstrance was given to their counsel at record on date of March 3, 1971, their counsel then had notice some twenty-three (23) days prior to the date of hearing that a hearing would be held. Fourteen (14) days after the court fixed a due process hearing on the issue of the sufficiency of the remonstrance, a hearing was held on the attorneys motion to withdraw his appearance. The court held notice to counsel of record is notice to the client. Further the court protected its record by having published notice of the hearing both on the motion for the second attorney to

to withdraw his appearance and also notifying the remonstrators by publication that a hearing would be held on the 26th day of March, 1971, as to the sufficiency of the remonstrance.

In the case at bar, no such notice of the hearing on the sufficiency of the remonstrance was ever given to any counsel at record much less to any of the remonstrators.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE COURT OF APPEALS OF INDIANA

THIRD DISTRICT

WORDEN CUSTARD, ET AL., Remonstrators-Appellants	)	
v.	)	No. 3-1080 A 333
CITY OF SOUTH BEND, Defendant-Appellee	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
HONORABLE WILLIAM A. HOSINSKI, JUDGE
CAUSE NO. E-9772

HOFFMAN, P.J.

This case arises from the passage of an annexation ordinance by the City of South Bend. In this particular appeal, Fred N. Davis, one of the original remonstrators, raises the following issues:

(1) whether the trial court erred in conducting a hearing on the sufficiency of the remonstrance when Davis had not received notice

of the hearing and was not represented by counsel;

(2) whether the trial court erred in conducting a hearing on the sufficiency of the remonstrance over objection of the remonstrators and in overruling the remonstrators' motions for a continuance;

(3) whether the trial court erred in overruling Davis's objection to a hearing on the sufficiency of the remonstrance and his petition to stay all proceedings; and

(4) whether the evidence is sufficient to sustain the trial court's dismissal of the remonstrance.

On August 24, 1971, twenty-nine remonstrators filed a remonstrance and appeal from a general annexation ordinance enacted by the City of South Bend. The remonstrators were represented by attorney Joseph Roper until his withdrawal on December 16,1975. On December 15, 1975 attorney Daniel Manion entered his appearance on behalf of all the remonstrators. Manion withdrew his

appearance on April 25, 1980 upon the representation of attorney Sanford Brook that he represented the remonstrators.

On April 29, 1980 Brook filed a request of certain remonstrators to withdraw from the case. Also on April 29, 1980 James Groves entered his appearance on behalf of certain remonstrators who had not joined in the petition to withdraw. It became apparent at this time that two or three of the remonstrators, including Davis, were not actually represented by counsel. Nevertheless, the court heard evidence regarding the request to withdraw on April 29 and 30, 1980. At the close of the evidence the trial court granted the parties an opportunty to file written briefs.

On May 7, 1980, Davis filed a written objection to the hearing held on April 29

and 30 and petitioned the court for a hearing and a stay of all proceedings. Davis's petition alleged that he had received no notice that Manion had withdrawn his appearance nor had Davis authorized Groves or Brook to represent him. Additionally, Davis alleged that he had not been notified of the hearing on April 29 and 30.

On May 9, 1980 the trial court overruled Davis's objection and motions for hearing and stay of the proceedings. On the same date, the trial court granted the petition to withdraw, found the remonstrance insufficient and dismissed the remonstrance and appeal.

The crux of this controversy concerns IC 1971, 18-5-10-24 (Burns Code Ed.). The statute provides:

> "Remonstrance against annexation--Procedure for filing.-- Whenever territory is annexed to

a city, whether by general ordinance defining the city boundaries or by special ordinance for the purpose of annexing territory, an appeal may be taken from the annexation by either a majority of the owners of land in the territory or by the owners of more than seventy-five percent (75%) in assessed valuation of the real estate in the territory, if they deem themselves aggrieved or injuriously affected, by filing their remonstrances in writing against the annexation, together with a copy of the ordinance, in the circuit or superior courts of the county where the territory is situated or with the judge thereof in vacation within sixty (60) days after the last publication provided for in section 402 (18-5-10-20) of this article. The written remonstrance or complaint shall state the reason why annexation should not in justice take place.

"Upon receipt of the remonstrance the court or the judge thereof in vacation shall determine whether it bears the necessary signatures and complies with the requirements of sections 406 through 408 (18-5-10-24 -- 18-5-10-16) of this article.

> In determining the total number of landowners of the area and whether or not signers of the remonstrance are landowners, the names as they appear upon the tax duplicate shall be prima facie evidence of ownership. In ascertaining the number of landowners of the area and for the purpose of determining the sufficiency of the remonstrance as to the number of landowners required to constitute a majority, not more than one (1) person having an interest in a single property, as evidenced by the tax duplicate, shall be considered a landowner.
>
> "Upon the determination of the judge of the court that the remonstrance is insufficient he shall fix a time for a hearing on the remonstrance which shall be held not later than sixty (60) days thereafter. Notice of the proceedings by way of summons shall be served upon the proper offices of the city seeking to make annexation, and the city shall become defendant in such cause, and shall be required to appear and answer as in other cases."

Davis contends that this statute mandates a hearing on the sufficiency of the remonstrance which complies with due

process requirements. The City on the other hand argues that it is within the province of the judge to determine the insufficiency of a remonstrance without conducting a hearing. According to the City, a hearing is necessary only after a judicial determination that the remonstrance is sufficient.

In construing a statute, the proper objective of a court is to ascertain and effectuate the intent of the Legislature as shown by the whole act, the law existing before its passage, changes made and the apparent motive for making them. Froberg v. Northern Indiana Const., Inc. (1981), ___Ind. App. ___, 416 N.E. 2d 451. The prior statute regarding the sufficiency of a remonstrance, Acts 1935, Ch. 153 § 1, provided for a court hearing to determine if a sufficient percentage of property owners joined in the

remonstrance. This procedure was changed in 1955 to the present form which does not specifically require a hearing until after a judicial determination that the remonstrance is sufficient. The deletion of the hearing requirement before a sufficiency determination is made is in harmony with the principle recognized by this Court "that the context of the statutes regulating annexation contemplates proceeding at an accelerated pace to the extent that good practice would dictate expeditious handling." Bata Shoe Co., Inc. et al. v. City of Salem et al. (1972), 153 Ind. App. 323, 287 N.E. 2d 350, at 352. It is apparent by the nature of the annexation statutes and the amendments of the statutes that the Legislature intended to eliminate the necessity for a hearing prior to a determination of the sufficiency of a

remonstrance.

Davis refers this Court to cases in which a hearing on the sufficiency of a remonstrance was conducted by the trial court. The fact that some trial courts have found it helpful to conduct a hearing prior to making its determination on the sufficiency of the remonstrance does not make such a hearing a requirement in all cases. On the contrary, the language utilized in other cases indicates that a hearing is not required. In In re Annex., etc., et al. v. Minne et al. (1965) , 138 Ind. App. 207, at 212, 212 N.E. 2d 393, at 396 this Court stated:

> "Under the provisions of the section quoted (18-5-10-24), the trial court determines whether the remonstrators so filing constitute a majority of the owners of land in the territory, or are owners of 75% of assessed valuation of the real estate in the territory and if the documents 'state the reason why such

> annexation ought not in justice take place.' To determine if it bears the necessary signatures and otherwise complies with the requirements of the section is a judicial function." (emphasis added.)

In In re Annexation etc. v. City of Anderson (1961), 135 Ind. App. 92, at 98, 190 N.E. 2d 428, at 431 the Court held:

> "Under the statute it is therefore incumbent upon the trial court to determine the sufficiency of the remonstrance as to whether it has a majority of the owners of the land or territory which is sought to be annexed or more than 75% of the assessed valuation of the real estate in such territory. This question is placed at issue when the remonstrance is filed." (emphasis added.)

See also, Bata Shoe Co., Inc., et al. v. City of Salem et al., supra, where this Court reversed and remanded the case with orders to the trial court to make a finding on the sufficiency of the

remonstrance.

Trial courts have employed many methods in making the necessary determination. In City of Anderson, supra, the trial court appointed commissioners to determine from the auditor's transfer books the number of owners of land and also a description of valuation. The court also heard other evidence on the matter. In Petercheff et al. v. City of Indianapolis (1961), 242 Ind. 490, 178 N.E. 2d 746, the trial court apparently based its decision on a report of the county auditor. The statute itself provides that "(i)n determining the total number of landowners of the area and whether or not signers of the remonstrance are landowners, the names as they appear upon the tax duplicate shall be prima facie evidence of ownership."

In the present case, the remonstrance and appeal contained a tax duplicate naming the owners of the land in the area sought to be annexed along with the assessed valuation of each parcel of land. Although any party could have employed several methods to cause a ruling on the sufficiency issue, see Bata Shoe Co., Inc. supra, no one chose to do so. The record reveals that at the time the request to withdraw was filed, the sufficiency question had not been determined. According to Petercheff et al. v. City of Indianapolis, supra, remonstrators may withdraw at any time before the sufficiency determination is made. The withdrawal in this case was therefore timely filed. At that time the court needed only to compare the signatures on the petition to withdraw with the signatures on the remonstrance and make

some simple calculations with regard to the assessed valuation of the property in order to determine if the remonstrance was sufficient. A hearing in compliance with due process principles was not necessary for the trial court to determine the sufficiency of the remonstrance.

The withdrawing remonstrance did present some evidence for the trial court's benefit. This evidence was presented primarily to inform the court as to the time and place the request to withdraw was signed. Additionally, the court requested to be informed as to whether certain people who had signed the request to withdraw were the successors in interest to original remonstrators. This evidence was also presented to the court. In gathering this information the court did not need to conduct an adversarial hearing. Since an

adversarial hearing was not required before the trial court made its determination on the sufficiency of the remonstrance, Davis has failed to show any harm with regard to his lack of notice, lack of representation and denial of the remonstrators' motions for a continuance. Additionally, Davis has shown no prejudice in the trial court's overruling of his objections to the hearing.

Davis next contends that the trial court erred in overruling his motion for a stay of all proceedings. Davis asserts IC 1971, 34-1-60-7 (Brusn Code Ed.) as grounds for his motion. The statute provides:

> "When to produce authority. -- the Court or judge may, on motion of either party, and on showing reasonable ground therefor, or without such motion, require an attorney to produce and

> prove the authority under which he appears, and until he does so, may stay all proceedings by him on behalf of the party for whom he assumes to appear."

Davis requested the court to direct Brook to produce the authority under which he appeared for the remonstrators.

The statute gives a trial court discretion in requiring an attorney to produce the authority under which he appears. The trial court's decision therefore can be reversed only upon a showing of an abuse of that discretion. In the present case Brook initially appeared on behalf of all the remonstrators. Later, attorney Groves filed an appearance on behalf of certain named remonstrators. At the hearing, Brook sought to limit his representation to those remonstrators seeking withdrawal. It was Brook who filed the request for withdrawal. Attached to the request was an "Authority to

Withdraw Remonstrance" in which the remonstrators seeking to withdraw stated that Brook had been requested by them to withdraw their remonstrance. This document was signed by all those seeking to withdraw. This is sufficient to establish Brook's authority to represent the withdrawing remonstrators. When these remonstrators were permitted to withdraw, the trial court lost subject - matter jurisdiction over the action. Davis therefore has again failed to show prejudice. The trial court did not abuse its discretion in failing to stay all proceedings.

Davis finally contends that there is no evidence of probative value upon which the trial court's dismissal of the remonstrance can be based. Contrary to Davis's assertion, the evidence is sufficient. The remonstrance contains a

tax duplicate including the names of all of the property owners in the area sought to be annexed. Also included in the tax duplicate was the assessed valuation of each parcel of land. The trial court, after determining successors in interest, could simply compare the signatures on the petition to withdraw with those on the remonstrance and make some simple calculations with respect to the assessed valuation to determine if the remonstrance met the requirements of IC 1971, 18-5-10-24. As noted above, a hearing in which all the pleadings were entered into evidence was not necessary. The trial court was free to use the pleadings and tax duplicate, along with other devices, in reaching its determination on the sufficiency of the remonstrance.

The annexation statutes are designed to facilitate an expeditious resolution

to annexation problems. The annexation ordinance in the present case was enacted in 1971. There has been a long, unexplained delay in these proceedings. Davis has failed to show any prejudice in the trial court's handling of the matter. For the foregoing reasons the decision of the trial court is affirmed.

Affirmed.

GARRARD and STATON, JJ. CONCUR.

APPENDIX B

IN THE SUPREME COURT OF INDIANA

No. 3-1080A333

WORDEN CUSTARD, et al., Appellants,	)	APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
vs.	)	THE HONORABLE WILLIAM A. HOSINSKI, JUDGE
CITY OF SOUTH BEND, Appellee.	)	

You are hereby notifed that the Supreme Court has on this day denied Appellants' (Custard, et al) "Petition for Transfer". Given, C.J. All Justices Concur.

/s/ Marjorie H. O'Laughlin
Clerk, Supreme Court and
Indiana Court of Appeals

Witness my name and the seal of said Court, this 31st day of December, 1981.

APPENDIX C

ST. JOSEPH SUPERIOR COURT
JUDGE HOSINSKI, DIVISION III

FRIDAY, MAY 9, 1980

E-9772 WORDEN CUSTARD ET AL vs. CITY OF SOUTH BEND

The objection to the hearing heretofore held April 29 and 30, 1980, filed by Fred N. Davis et ux, is overruled. Court having heard evidence, the argument of counsel, and examined memorandum submitted by each group heretofore heard, now finds that no judicial determination of the sufficiency of the remonstrance herein has ever been made. Those certain remonstrators desiring to withdraw as remonstrators to this action, appearing by Atty. Sanford M. Brook, whose names are more particularly set out in Exhibits "A" and "B" of the "Request of Certain Remonstrators to Withdraw as Remonstrators

in this Action", should be, and now are permitted to withdraw as remonstrators. And now the motion for leave to withdraw as remonstrators heretofore filed April 29, 1980 by certain of the remonstrators in this cause is granted, and those remonstrators whose signatures appear on Exhibit "A" of said motion being entitled "Authority to Withdraw Remonstrance" now withdraw as remonstrators herein.
Now said parties so designated having withdrawn as remonstrators from this cause the remaining remonstrators do not constitute" ... a majority of the owners of land in the territory..."; nor do they constitute "...owners of more than seventy-five (75%) per cent in assessed valuation of the real estate in the territory..." to be annexed. Therefore the court finds the remonstrance insufficient and orders the same dismissed.